Supreme Court, U.S.
FILED
APR 30 1992
OFFICE OF THE CLERK

No. 91-321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,
Petitioner,
v.
JOE HUDDLESTON, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF AMICI CURIAE ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT, U.S. ATLANTIC & GULF WESTERN MEDITERRANEAN RATE AGREEMENT, SOUTH EUROPE/U.S.A. FREIGHT CONFERENCE AND THE "8900" LINES IN SUPPORT OF PETITIONER

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April 30, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
INTEREST OF AMICI CURIAE	3
ARGUMENT	5
I. THE TENNESSEE TAX AS APPLIED TO THE LEASE OF CONTAINERS IS PREEMPTED BECAUSE IT FRUSTRATES THE PURPOSES AND OBJECTIVES OF CONGRESS IN RATIFYING AND IMPLEMENTING THE 1956 AND 1972 CUSTOMS CONVENTIONS ON CONTAINERS	5
A. The Customs Conventions On Containers Were Designed To Promote And Facilitate Containerized Ocean Transportation	6
B. The Facilitation of Container Transportation Was To Be Accomplished In Large Part By Freedom From Taxation In Signatory Nations	7
C. Tennessee's Imposition Of Sales Tax On Containers In International Commerce Frustrates Congressional Purpose And Is Thus Preempted	8
D. The Tennessee Tax Burdens The Activities of The Companies That Distribute and Use Containers	12
E. The Threat Of Retaliation Magnifies The Burden Imposed By The Tennessee Tax	15
II. THE TENNESSEE TAX IS PREEMPTED BECAUSE IT IS CONTRARY TO A PERVASIVE FEDERAL SCHEME OF REGULATING CONTAINERS	16
CONCLUSION	19
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases — Page

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983) 15
Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 5, 16
Graham v. Commissioner, 822 F.2d 844, 852 (9th Cir. 1987), *aff'd sub nom. Mennendez v. Commissioner*, 490 U.S. 680 (1989), *reh'g denied*, 492 U.S. 933 (1989) 14
Hampton, Jr., Co. v. United States, 276 U.S. 394 (1928) 14
Hillsborough County v. Automated Mediterranean Laboratories Inc., 471 U.S. 707 (1985) 5
Hines v. Davidovitz, 312 U.S. 52 (1941) 5, 18
Hooten v. Carson, 209 S.W.2d 273 (Tenn. 1948) 4
Itel Containers Int'l Corp. v. Charles E. Cardwell, Commissioner of Revenue, Tenn., 814 S.W.2d 29 (Tenn. 1991) 14, 16, 17
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 6, 14
Jones v. Rath Packing Co., 430 U.S. 519 (1977), *reh'g denied*, 431 U.S. 925 (1977) 5, 18
Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 16
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) 2, 8, 9, 10, 13, 14, 16, 18
Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), *aff'd*, 457 U.S. 624 (1982) 18
NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980) 7
Northeast Marine Terminal v. Caputo, 432 U.S. 249 (1977) 7
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 5, 16
Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc., 773 S.W.2d 252 (Tenn. Ct. App. 1989) 4
Xerox Corp. v. County of Harris, Tex., 459 U.S. 145 (1982) 2, 9, 10, 16

TABLE OF AUTHORITIES—Continued

Constitutional Provisions — Page

United States Constitution Art. I, § 8, cl. 3 2
United States Constitution Art. I, § 10, cl. 3 3
United States Constitution Art. VI, cl. 2 5

Treaties

Customs Convention on Containers, December 2, 1972, 988 U.N.T.S. 43 ..... 2, 6, 8, 11
Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 ..... 2, 6, 8

Statutes

19 U.S.C. § 1322(a) 17
46 U.S.C. app. § 1701 et seq. 3
Cal. Revenue and Tax Code § 6203 (West 1987) 4
N.J. Stat. Ann. § 54:32B-14 (West 1986) 4
New York Tax Law § 1132(a) (1988) 4
Tenn. Code Ann. § 67-6-502 (1989) 4
Tenn. Code Ann. § 67-6-204 (1989) 11, 12
Va. Code Ann. §§ 58.1-625 (1991) 4

Regulations

19 C.F.R. § 10.41a(a) 17
19 C.F.R. § 10.41a(a)(1) 17
19 C.F.R. § 10.41a(a)(3) 17
19 C.F.R. § 10.41a(c) 17
19 C.F.R. § 113.66 17
19 C.F.R. § 113.66(a) 11, 17
19 C.F.R. § 113.66(c) 17
19 C.F.R. § 115 17

Legislative History

President's Message to Senate Transmitting Advice and Consent, November 14, 1973 16
U.N. Doc. E. CONF. 59/2 (Feb. 22, 1971) 6, 7
U.N. Doc. E. CONF. 59/16 (Nov. 26, 1971) 7, 14, 15

Miscellaneous

Itel Trial Exhibit 3 11
Itel Trial Exhibit 7 ..... 10, 11

TABLE OF AUTHORITIES—Continued

	Page
Itel Trial Exhibit 13	10, 11
Itel Trial Exhibit 15	10, 11
Itel Trial Exhibit 22	10
Klein, Bittker, and Stone, FEDERAL INCOME TAXATION (7th ed. 1987)	14
TSUS 640.30	10
VAT (General) Regulations 1985, Regulation 50	12
HM Customs and Excise Notice 748 (Jan. 1, 1991)	12

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SUMMARY OF ARGUMENT

The *amici* filing this brief support the position of petitioner Itel Containers International Corporation that the decision of the Tennessee Supreme Court upholding the application of the Tennessee sales tax to the lease of cargo containers used exclusively in international commerce and brought into the United States under customs bond is incorrect and should be reversed.

The application of the Tennessee tax in this context is preempted pursuant to the Supremacy Clause of the United States Constitution because it is in direct contra-

vention of the letter and spirit of two treaties to which the United States is a party, the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, and the Customs Convention on Containers, December 2, 1972, 988 U.N.T.S. 43. The tax as applied frustrates the purpose of these Conventions and various implementing statutes and regulations, which was to promote and facilitate the use of containers in international commerce by, *inter alia*, freeing them from Customs duties and other duties, taxes, fees, and charges. Article 1(a), 988 U.N.T.S. at 44. The Tennessee tax, as applied, burdens not only container leasing companies such as the petitioner, it also burdens ocean carriers such as the members of the *amici* conferences that lease the containers for use in international commerce and that bear the ultimate burden of the tax.

The Tennessee tax is also preempted because it is inconsistent with a pervasive scheme of federal regulation of containers implementing the Customs Conventions. This regulatory regime exempts containers from customs duties that would otherwise be imposed and prescribes detailed standards and requirements for the admission of containers into the United States under customs bond.

The burden imposed on containers and containerized shipping in this case is comparable to the burden imposed on protected activities in other cases decided by this Court in which similar state taxes have been held to be preempted. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); *Xerox Corp. v. County of Harris, Tex.*, 459 U.S. 145 (1982).

In addition to the immediate burden of the Tennessee tax, if upheld it would open the door for the imposition of further burdens on containers and containerized shipping by other states and other countries who are signatories to the Customs Conventions but who do not currently tax container leases.

The *amici* also contend that the Tennessee tax as applied violates the Commerce Clause, Art. I, § 8, cl. 3, and

the Import-Export Clause, Art. I, § 10, cl. 3, of the United States Constitution. Those provisions are discussed in detail in briefs submitted by the petitioner and by other *amici* steamship industry interests. Accordingly, the *amici* Conferences support the analysis contained in those briefs, and will not address those provisions in detail herein.

INTEREST OF AMICI CURIAE

The *amici curiae* filing this brief are four conferences of ocean common carriers of cargo (hereinafter collectively referred to as the "Conferences"). The member carriers of the Conferences are permitted to discuss and agree upon matters of mutual interest in accordance with agreements filed with the United States Federal Maritime Commission pursuant to the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.* The Conference members include many of the largest United States and foreign flag liner carriers in the world, operating in major trades in the United States foreign commerce.[1] Their vessels are largely containerized and hence they utilize a large number of containers, some of which they own and some of which they lease.

As a result of the nature of their trade and business, as described above, the Conferences are concerned with the economic impact which the decision of the Tennessee Supreme Court will have on their operations in the foreign

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[1] The Conferences include a total of 21 ocean carriers based in 14 countries. Four of these carriers leased containers from Itel in Tennessee during the period relevant to this case. Itel Trial Exhibit 7. The members of the *amici* Conferences operate in the trades from the Far East (except Japan) to the United States (Asia North America Eastbound Rate Agreement), from the United States to the Mediterranean (U.S. Atlantic & Gulf Western Mediterranean Rate Agreement), from the Mediterranean to the United States (South Europe/U.S.A. Freight Conference), and from the United States to the United States to the Middle East (The "8900" Lines). A complete list of the Conference member carriers, and their nationality, is attached hereto as Appendix A.

commerce of the United States. In particular, the Conferences are concerned because they ultimately bear the brunt of the disputed tax. Although the incidence of the tax technically falls on the retailer (the lessor in this case), the Tennessee statute requires that the tax "shall be collected by the retailer from the consumer insofar as it can be done." Tenn. Code Ann. § 67-6-502 (1989). The cases construing this section make it clear that "the burden for the payment of the tax is meant to be that of the buyer." *Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc.*, 773 S.W.2d 252, 257, 260 (Tenn. Ct. App. 1989). *See also Hooten v. Carson*, 209 S.W.2d 273 (Tenn. 1948).

Thus, in practical terms, the effect of applying the Tennessee sales tax in this context will be to impose on ocean carriers such as the members of the Conferences, who lease containers for use in international commerce, a significant added cost of doing business in Tennessee. In addition, such a tax would likely cause them to lease containers in countries other than the United States whenever possible, diverting container business from the United States. Finally, the Conferences are also concerned that, if upheld by this Court, Tennessee's action likely will encourage other states [2] and other countries that do not currently do so to impose similar sales or other taxes on containerized shipping, further burdening their operations.

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[2] In most other states with sales taxes, the burden of the tax also falls on the consumer, in this case the lessee. *See, e.g.*, Cal. Revenue and Tax Code § 6203 (West 1987); New York Tax Law § 1132(a) (1988); Va. Code Ann. §§ 58.1-625 (1991); N.J. Stat. Ann. § 54:32B-14 (West 1986). Thus, to the extent other states follow Tennessee's lead, the financial burden on ocean carriers' containerized operations would correspondingly increase.

ARGUMENT

I. THE TENNESSEE TAX AS APPLIED TO THE LEASE OF CONTAINERS IS PREEMPTED BECAUSE IT FRUSTRATES THE PURPOSES AND OBJECTIVES OF CONGRESS IN RATIFYING AND IMPLEMENTING THE 1956 AND 1972 CUSTOMS CONVENTIONS ON CONTAINERS

Federal preemption of state statutes is rooted in the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. Federal law may preempt state law either expressly or implicitly. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *reh'g denied*, 431 U.S. 925 (1977). Absent express preemption, Congressional intent to preempt may be manifested in a number of different ways, including when there is a clear objective that is sought to be obtained by the federal law, when there is a pervasive system of federal regulation, or when the federal interest in an area is so dominant that it will be assumed to preclude enforcement of state law on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Of particular application in this case is the well-established principle that when a state tax or other law frustrates the purposes of federal regulation or stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, it is pre-empted by virtue of the Supremacy Clause. *Hillsborough County v. Automated Mediterranean Laboratories Inc.*, 471 U.S. 707, 713 (1985); *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941). The application of the Tennessee sales tax to the lease of containers moving exclusively in the foreign commerce of the United States frustrates a strong federal policy, rooted in two international treaties, of encouraging the type of international containerized transportation engaged in by the members of the Conferences

and to proscribe hindrances to, and burdens on, such transportation.

A. The Customs Conventions On Containers Were Designed To Promote And Facilitate Containerized Ocean Transportation

Two international conventions ratified by the United States directly govern the use of containers in international commerce, the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 (the "1956 Convention"), and the Customs Convention on Containers, December 2, 1972, 988 U.N.T.S. 43 (the "1972 Convention"). The purpose of the Conventions was "to develop and facilitate international carriage by container . . . ." 1972 Convention, 988 U.N.T.S. at 44. See also, 1956 Convention, 20 U.S.T. at 304.

This purpose, as ratified and implemented by the United States, was reiterated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). There, the Court stated that the 1956 Convention "reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic.'" *Id.* at 453. The Court stated that the 1956 Convention was implemented because of "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce . . . ." *Id.* at 452.

After the 1956 Convention, there was a "considerable increase in numbers of containers used in international traffic," U.N. Doc. E. CONF. 59/2 (Feb. 22, 1971), at 1 (Note by the Secretariat). This development is generally referred to in the industry as the "container revolution." As technology developed, ocean carriers gradually shifted from "breakbulk" ships, where individual pieces of cargo were loaded on a vessel, to container ships, where cargoes are packed into containers, usually by the customer, and then the containers are moved on and off the vessel without having to handle individual

pieces of cargo. Containerization offers great cost savings to carriers in terms of labor and handling costs, which in turn results in greater efficiencies and reduced transit times for their customers. At the same time, it required huge capital investments in new ships and containers and related equipment. The benefits and efficiencies of containerization were discussed in detail by this Court in *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 495-496 (1980). *See also, Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 270-271 (1977).

The container revolution resulted in the "need both for simplifying Customs formalities and facilitating container transport." U.N. Doc. E. CONF. 59/2 (Feb. 22, 1971), at 1 (Note by the Secretariat). Hence, the 1972 Convention was crafted. The purpose of the new Convention was, as stated by the United States in its comment on the draft 1972 Convention, to "contribute *significant economic benefits* to the development and facilitation of international container traffic on a global basis." U.N. Doc. E. CONF. 59/16 (Nov. 26, 1971), at 2 (emphasis added). Such economic benefits were necessary to induce ocean carriers to make the investments necessary to containerize their operations.

B. The Facilitation of Container Transportation Was To Be Accomplished In Large Part By Freedom From Taxation In Signatory Nations

To facilitate the international carriage of cargo by containers, the Conventions adopted the fiction of "temporary admission." This fiction is based on the simple concept that containers moving in international traffic do not enter the domestic stream of commerce of any of the signatory nations, and therefore are not subject to the burdens and responsibilities imposed on domestic commerce.

The primary mechanism provided under the Conventions to implement the temporary admission concept and

confer economic benefits on containerized transportation was freedom from fees and taxes relating to international containers. The Conventions provide that such containers should enter the signatory nations "free of import duties and taxes." Article 1(b) of the 1972 Convention, 988 U.N.T.S. at 44; Article 2 of the 1956 Convention, 20 U.S.T. at 304. This protection is limited to containers being used in international commerce, however. Containers temporarily admitted must be re-exported within three months of admission. 1972 Convention, Art. 4.1.

The protection from "import duties and taxes" was intended to be expansive. The term was defined in the 1956 Convention to mean "not only Customs duties but also *all* duties *and taxes whatsoever* chargeable by reason of importation." 1956 Convention, Article 1(a), 20 U.S.T. at 304 (emphasis added). This definition was broadened in the 1972 Convention to encompass ". . . Customs duties and *all other duties, taxes, fees and other charges* which are collected on, *or in connexion with*, the importation of goods . . . ." Article 1(a) of the 1972 Convention, 988 U.N.T.S. at 44 (emphasis added).

C. Tennessee's Imposition Of Sales Tax On Containers In International Commerce Frustrates Congressional Purpose And Is Thus Preempted

The imposition of a sales tax by the State of Tennessee on containers which are instruments of international traffic directly frustrates Congressional policy, as expressed in the Conventions and the federal statute and regulations implementing them, by placing significant economic burdens on containerized transportation. Economic burdens on protected activities or groups have been struck down by this Court in similar situations. The much-discussed case of *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), is directly relevant to the current case.

In *McGoldrick*, the Court found that a New York sales tax levied on crude oil that had been imported in bond,

stored in bonded warehouses, and delivered to foreign-bound vessels in New York City was preempted by a federal scheme of statutes and regulations governing customs bonded warehouses. The Court found that the purpose of the federal scheme therein at issue was to enable American manufacturers to compete more favorably with their foreign competitors. *Id.* at 427. It further found that economic burdens on such manufacturers would frustrate that purpose if they detracted from the protections and advantages afforded by the federal regulation.

> The purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duties.

Id. at 429.

While *McGoldrick* spoke of taxes that "might equal or exceed the remitted import duty," 309 U.S. at 429, the subsequent case of *Xerox Corp. v. County of Harris, Tex.*, 459 U.S. 145 (1982) made it clear that any tax large enough "to *offset substantially* the very benefits Congress intended to confer by remitting the duty" would be preempted. *Id.* at 154 (emphasis added). *Xerox* involved the imposition by the city of Houston of *ad valorem* property taxes on copiers stored in a customs bonded warehouse. This Court held that the *Xerox* tax would frustrate the goal of Congress as reflected in its comprehensive federal scheme to encourage merchants here and abroad to make use of American ports as transshipment centers for goods in foreign trade.

In *Xerox*, the taxpayer paid taxes of $211,112, less than one-third of the $540,000 in customs duties that would have been due from Xerox had it been liable for such duties. 459 U.S. at 527-8 n.9. Nevertheless, the Court found that that burden was significant enough to frustrate the benefits intended to flow from the federal scheme. *Id.* at 527.

The Tennessee tax at issue in this case imposes a burden that nearly equals the potential import duties intended by the Conventions to be avoided. This is precisely the type of burden that was struck down in *McGoldrick* and *Xerox*. If Itel's containers had not been exempt from Customs duties, Itel would have had to pay approximately $178,550 in duties on its container fleet during the relevant period.[3] In comparison, Itel's assessment of sales tax during the period was $158,012, nearly the same amount. It is hard to imagine a fact situation that more closely corresponds with *McGoldrick* and *Xerox* than this one.

In its *amicus* brief opposing *certiorari* (Brief of the United States as *Amicus Curiae* at 9), the United States dismissed the application of the Customs Conventions because the taxes at issue are sales taxes, not customs duties. The State of Tennessee makes a similar argument in its response to the *certiorari* petition. This narrow reading is directly contrary to prevailing case law.

The *McGoldrick* and *Xerox* cases make it clear that preemption may occur if the federal scheme is frustrated even if, as here, the tax is not the specific type of tax prohibited in the statutory scheme. It is instructive that in *McGoldrick*, Congress relied on federal statutes and regulations that prohibited the imposition of *import duties* on bonded fuel and other materials. However, the tax struck down was not an import or customs duty, it was a sales tax. Thus, *McGoldrick* firmly established the principle that a comprehensive federal scheme may protect not just against the type of tax or duty specified, but also against any other type of tax on the protected

[3] During the period, containers that were not used in international commerce were subject to a duty of anywhere from 0.6% to 2.5% of the value of the goods during the relevant period. TSUS 640.30. The replacement value of Itel's container fleet during the relevant period can be estimated at $11,109,172. Stipulation 92, Trial Ex. 7, 13, 15, 22. Based on this, the duty on those containers, at the above rates, would have been $178,550.

activity which would have a comparable burdensome effect on the activity. The same principle applies in this case.

In any event, however, the protections of the Conventions are not limited strictly to Customs duties. As discussed at pages 9-10 *supra*, the duties prohibited by the Conventions have been broadly defined to include "all other duties, taxes, fees and other charges" imposed "in connexion with" or "by reason of" importation of goods.

The Tennessee sales tax as applied here falls squarely within these prohibitions. By their nature, containers in international commerce typically enter the country with an import load and are then loaded for export.[4] Thus, the containers taxed will in most cases carry a load of imported goods into the United States at or near the time of the tax. The record indicates that 61% of the Itel containers subjected to tax in this case were subsequently used in a United States import move during the lease period. Itel Trial Exhibits 3, 7, 13, and 15. Because these are bonded international containers, it is likely that virtually all the containers originally moved to Tennessee either directly or indirectly from another country, *i.e.*, through an import move. Thus, importation is the very reason the containers are in the United States and the reason they are leased by ocean carriers, thereby becoming subject to the Tennessee tax.

That the Tennessee tax as applied to containers is a "tax . . . chargeable by reason of importation," or "in connexion with importation" is further evidenced by the fact that it is measured as a percentage of the gross proceeds of the lease during the lease period. Tenn. Code

[4] There is a clear demarcation line between the international containers at issue in this case and containers moving in United States domestic commerce. Bonded containers lose their protection from customs duties if they are used in domestic commerce. 19 C.F.R. § 113.66(a). In addition, they lose their treaty protections if they remain in the United States for more than three months without being reexported. 1972 Convention, Article 4.1, 988 U.N.T.S. at 45.

Ann. § 67-6-204. In this case, Itel's containers were leased on a *per diem* basis, which is the common lease term in the industry. In other words, the more they are used in international commerce during the lease period, the greater the amount of the tax.

Ocean carriers have a strong economic incentive to move containers as rapidly as possible. This means that for the containers leased by Itel, or those leased in any other state, the time spent in the leasing state will generally be a small fraction of the time consumed by the international move as a whole. Accordingly, although the State of Tennessee may assert that the tax is imposed merely on an event that occurs solely within the state, in practice it is imposed on containerized transportation that occurs almost entirely outside the state and that occurs exclusively in international commerce.

The fact that none of the other countries which are signatories to the Conventions impose sales taxes on the lease of containers in their country is further strong evidence that they construe the Conventions to prohibit these types of taxes. It also indicates that such construction reflects the intent and understanding of the parties when entering into the Conventions. For example, the United Kingdom specifically exempts from the Value Added Tax leases of both export and import containers. VAT (General) Regulations 1985, Regulation 50; HM Customs and Excise Notice 748 (Jan. 1, 1991).

D. The Tennessee Tax Burdens The Activities of The Companies That Distribute and Use Containers

The burden the Tennessee tax, as applied, places on (i) the container leasing companies that provide many of the containers covered by the Conventions, and (ii) ocean carriers such as the members of the *amici* Conferences that use containers in their international containerized shipping operations, demonstrates how the tax frustrates the federal purpose of facilitating containerized transportation. The Tennessee tax burdens these entities in a number of critical ways.

First, the tax places an obvious burden on the companies, such as Itel, that lease containers in the United States. To the extent they cannot collect the tax from their lessee customers, they will pay significant amounts in taxes and will incur significant administrative expenses in processing the tax and tax monies.

In addition, the leasing companies will be placed at a competitive disadvantage vis-a-vis their foreign competitors that lease containers in other countries, such as the EEC countries, where a tax is not imposed on container leases by the country or any subnational unit. The absence of a tax in such countries would provide an incentive for carriers and other lessees to procure their containers outside the United States, causing the American companies to lose business. It could even cause those companies, to the extent they could, to shift their operations more heavily to countries in which no tax is applied in order to allow their customers to escape the tax. Since the lessees of these containers by definition operate between the United States and foreign countries, they would in most cases be able to lease containers on the other side of the ocean.

Taxation of containers also imposes significant burdens on containerized ocean carriers. As noted at pages 4-5 *supra*, the Tennessee tax requires that the tax be passed on to the consumer, in this case the lessee. Thus, carriers will be taxed for engaging in the very activity that is intended to be protected under the Conventions. This is contrary to the purpose of the Customs Conventions, which was to "contribute significant economic benefits" to facilitate "container traffic on a global basis." Economic benefits to a protected activity or group are a well-recognized basis for federal preemption protection. *McGoldrick*, *supra*, 309 U.S. at 426-27.

The burdens on carriers and leasing companies are significant because those entities are entitled to protec-

tions under the Conventions and the federal regulatory scheme. The Tennesse Supreme Court erred when it concluded that this Court in *Japan Line* found "no Congressional intent to benefit container companies in the statutes regulating cargo containers." *Itel Containers Int'l Corp. v. Charles E. Cardwell, Commissioner of Revenue, Tenn.*, 814 S.W.2d 29, 44 (Tenn. 1991). It is hard to imagine what the Tennessee court believes Congress intended to protect by ratifying the Customs Conventions and by enacting broad based container regulations if not container leasing companies and containerized carriers. Treaties and statutes do not generally protect or promote mere objects, they generally also promote activities or groups.

In this case, it is clear that the Conventions were intended to protect not only containers, but also to "contribute significant economic benefits to the development and facilitation of international container traffic on a global basis," U.N. Doc. E. CONF. 59/16 (Nov. 26, 1971) at 24. Economic benefits redound to the parties carrying out the container transportation, such as the Conference members, not to the containers themselves.[6] In this case,

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[6] Economic benefits, whether conferred by a treaty or a statute, are often used as tools of federal regulatory policy to encourage or discourage an activity. A prime example is the tax deduction, which fosters such Congressionally-endorsed policies as home purchasing and charitable donations. See, *Graham v. Commissioner*, 822 F.2d 844, 852 (9th Cir. 1987), *aff'd sub nom. Mennendez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), *reh'g denied*, 492 U.S. 933 (1989) (citing charitable deductions' "objective of aiding education, science, and literary pursuits, and religion, an end that has become a central feature of national tax policy"); Klein, Bittker, and Stone, FEDERAL INCOME TAXATION (7th ed.) at 457.

At the same time, taxes or duties are also a form of regulation. As this Court has stated, "[t]he laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce . . . ." *McGoldrick*, 309 U.S. at 428, *citing, Hampton, Jr., Co. v. United States*, 276 U.S. 394, 411 (1928).

the Conventions and federal regulations were designed to promote and encourage the containerized transportation of goods in international commerce by carriers by effectively subsidizing that transportation through abatement of taxes in connection with importation activities.

E. The Threat Of Retaliation Magnifies The Burden Imposed By The Tennessee Tax

The economic burden imposed by Tennessee on leasing companies and carriers is amplified by the risk that other states, in an effort to increase revenues, might follow Tennessee's lead if this tax is upheld. This would greatly increase the burden on containerized transportation, particularly if Tennessee's lead were followed in port states where many more containers are leased than in Tennessee.

The frustration of federal purpose is further increased in this case by the risk that other countries might seek to retaliate against the United States by imposing similar taxes. As this Court recognized in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, *reh'g denied* 464 U.S. 909 (1983) "[t]he most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." *Id.* at 194. Such retaliation would clearly frustrate the purpose of the Conventions, which was to develop and facilitate container traffic "on a global basis." U.S. Doc. E. CONF. 59/16 (Nov. 26, 1971) at 2. International comity was a major goal of the United States in entering into the Conventions. The White House's letter transmitting the 1972 Convention to the Senate states:

> This Convention is important because it will insure United States-owned containers the same treatment in the territories of States parties to this Convention as that afforded in the United States to foreign-owned containers.

President's Message to Senate Transmitting Advice and Consent, November 14, 1973.

The possibility of retaliation is not wholly speculative. The Conferences understand that the United Kingdom, an *amicus curiae* in this case, has indicated that if Tennessee's application of a sales tax on international containers is upheld it would have to reevaluate its own forebearance of taxation of such containers. This demonstrates that the threat of retaliation is real and could defeat the Conventions' stated purpose of facilitating container transportation throughout the world.

II. THE TENNESSEE TAX IS PREEMPTED BECAUSE IT IS CONTRARY TO A PERVASIVE FEDERAL SCHEME OF REGULATING CONTAINERS

The Tennessee tax is also pre-empted because it frustrates the pervasive scheme of federal regulation of containers. It is well-established that state laws that intrude into an area of pervasive federal regulation cannot stand. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) This principle applies equally to federal regulations as to federal statutes. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

In its opinion (814 S.W.2d at 42), the Tennessee Supreme Court sought to downplay the pervasiveness of the federal regulation of containers cases by comparing the Customs Service regulations on containers with the bonded warehouse regulations at issue in the *McGoldrick* and *Xerox* cases. This distinction is incorrect. The container regulations are indeed pervasive.

Largely for the purpose of implementing the Conventions, Congress and the Executive Branch have created a comprehensive federal scheme to facilitate the movement of containers in foreign commerce. The Secretary of the Treasury has, pursuant to authority conferred on him by

19 U.S.C. § 1322(a), designated containers as "instruments of international traffic." 19 C.F.R. § 10.41a (a)(1), (3). Consequently, containers are free from the application of the Customs laws as long as assurances are provided by the owner that they will not be used in U.S. domestic commerce. To secure compliance with these representations, the owner must post a continuous bond with the U.S. Customs Service. 19 C.F.R. § 10.41a(a), (c); § 113.66. There is also a scheme of federal regulations which provides the requisite procedures for the certification and approval of containers moving under Customs seal. 19 C.F.R. § 115.

The Tennessee Supreme Court distinguished the Customs regulations from the bonded warehouse regulations, among other things, on the grounds that "[c]argo containers are neither under the supervision nor in the custody of customs officers." 814 S.W.2d at 42. This does not mean the regulation of containers is not pervasive. Obviously, containers cannot be in the physical control or custody of customs officers because of their nature and function as vehicles of international transportation.

However, the containers are effectively under the control and supervision of the Customs Service. At all times they move under Customs bond and are subject to the requirements and penalties provided for in that bond. For example, if a container operator defaults on the terms of its bond, it must pay liquidated damages equal to the value of the merchandise. 19 C.F.R. § 113.66(c). If, for any reason, such bonded containers enter domestic commerce in any manner, they are subject to the ordinary incidence of taxes, charges, and duties, including import duties, and would no longer be subject to the regime of the Conventions and regulations and would no longer benefit from the protections that regime affords. 19 C.F.R. § 113.66(a). Thus, while somewhat different from the bonded warehouse regulations, the customs scheme is no less pervasive.

Moreover, pervasiveness is not the only grounds for federal preemption and is not an essential element of preemption. It is only one of a host of factors that each independently justify preemption. The primary grounds for the holding in *McGoldrick* was the frustration of Congressional purpose, not pervasiveness of the warehouse regulations. The comprehensive federal regulatory scheme was only one factor in determining the Congressional purpose. In *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), *reh'g denied*, 431 U.S. 925 (1977), this Court held that state regulation of weight information on packaged foods was preempted by the federal Fair Packaging and Labeling Act even though there was no holding that the federal scheme was pervasive, and despite the fact that the California requirement at issue was "not inconsistent with federal law." *Id.* at 541. There, the California requirements were struck down because they stood as an obstacle to the FPLA's purpose "to facilitate value comparison among similar products." *Id.* at 542.

Thus, even federal legislation that is not pervasive will preempt state statutes or regulations if they frustrate Congressional purpose or satisfy another of the tests of federal preemption. Cf. *Hines v. Davidovitz*, 312 U.S. 52 (1941); *Mite Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980), *aff'd* 457 U.S. 624 (1982).

CONCLUSION

For all the foregoing reasons, this Court should rule that the imposition of the Tennessee sales tax on containers which are instruments of international traffic is preempted pursuant to the Supremacy Clause of the United States Constitution because it frustrates important national purposes and policies expressed in the 1956 and 1972 Customs Conventions, as ratified and implemented by the United States, and is contrary to the pervasive federal statutory and regulatory scheme implementing those policies.

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April 30, 1992

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APPENDIX A

Names and Nationalities of
Ocean Carrier Members of Amici Conferences

Asia North America Eastbound Rate Agreement

American President Lines, Ltd. (USA)
Kawasaki Kisen Kaisha, Ltd. (Japan)
A.P. Moller-Maersk Line (Denmark)
Mitsui O.S.K. Lines, Ltd. (Japan)
Neptune Orient Lines, Ltd. (Singapore)
Nippon Yusen Kaisha Line (Japan)
Orient Overseas Container Line, Ltd. (Hong Kong)
Sea-Land Service, Inc. (USA)

South Europe/U.S.A. Freight Conference

Achille Lauro (Italy)
Compagnie Generale Maritime (France)
Compania Trasatlantica Espanola, S.A. (Spain)
Evergreen Marine Corporation (Taiwan) Ltd. (Taiwan)
Farrell Lines, Inc. (USA)
"Italia" di Navigazione, S.p.A. (Italy)
Lykes Bros. Steamship Co., Inc. (USA)
A.P. Moller-Maersk Line (Denmark)
Nedlloyd Lines (Nedlloyd Lijnen B.V.) (The Netherlands)
Sea-Land Service, Inc. (USA)
P&O Containers Limited (U.K.)
Zim Israel Navigation Company, Ltd. (Israel)

The "8900" Lines

A.P. Moller-Maersk Line (Denmark)
National Shipping Company of Saudi Arabia (Saudi Arabia)
Sea-Land Service, Inc. (USA)
United Arab Shipping Company (S.A.G.) (Kuwait)
Waterman Steamship Corporation (USA)

U.S. Atlantic & Gulf/Western Mediterranean Rate Agreement

Compagnie Generale Maritime (France)
Compania Trasatlantica Espanola, S.A. (Spain)
Evergreen Marine Corporation (Taiwan) Ltd. (Taiwan)
Italia di Navigazione, S.p.A. (Italy)
Lykes Bros. Steamship Co., Inc. (USA)
Nedlloyd Lines (Nedlloyd Lijnen B.V.) (The Netherlands)
P&O Containers Limited (U.K.)
Sea-Land Service, Inc. (USA)
Zim Israel Navigation Company, Ltd. (Israel)